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2008 MAY 22 [illegible]
NORTHERN DISTRICT TOLEDO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Tronsen

v.

Toledo-Lucas County Public Library

3:08 CV 148

Judge Carr

Plaintiff asks leave to file a restatement of his case.

Plaintiff says that he has not discovered another case similar to the instant matter. Therefore, Plaintiff posits that the court is obligated to draw inferences from other cases which consider principles – concepts which have been pronounced by higher courts.

If there is one quote from the USSC that summarizes Plaintiff's position, it is from Hustler Magazine v. Falwell, reported at 485 U.S. 46 (VA,1988) wherein the court said: "If a speaker's opinion causes offense, that consequence is a *reason* for according it Constitutional protection."

'Best Cases (?)': the closest case *may be* either Armstrong v. DC Public Library # 94-0392 (DC, 2001) or Brinkmeier v. Freeport # 93 C 20039 (IL,1993); Kreimer, 958 F.2d 1242. Plaintiff says these cases DO NOT CONTROL 'Directly' because they DID NOT INVOLVE matters of (alleged) First Amendment protected matters of speech-expression... Nevertheless, in Armstrong, the govt.defense (sought to evict Armstrong) was overruled on First Amendment grounds.

In Armstrong, we read:

"In determining the appropriate standard under which to review plaintiff's challenge to the Library regulation, the Court must first identify the nature of the forum to which plaintiff sought access. See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)(adopting "forum" analysis in order to determine whether a particular rule or regulation violates the First Amendment). **The parties correctly assert that a public library is a limited public forum for purposes of constitutional analysis.** See Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1250 (3d Cir.1992). Since the Government may limit access to a forum depending upon the nature of the forum, see id. at 1255, the Court must determine the extent to which access to this limited public forum may be restricted by the District of Columbia. See Cornelius, 473 U.S. at 797, 105 S.Ct. 3439."

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"Content-neutral regulations that limit protected First Amendment activities within a designated public forum may be *76 characterized as time, place and manner restrictions. Perry Educ. Ass'n, 460 U.S. at 45-46, 103 S.Ct. 948. **Such restrictions are constitutional only if they are "narrowly tailored to serve a significant governmental interest and ... leave open ample alternative channels for communication of information."**

"3. The Appearance Regulation Is Vague and Overbroad."

Overbreath and vagueness are often closely related in First Amendment analysis. Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ("[W]e have traditionally viewed vagueness and overbreath as logically related and similar doctrines."). Here plaintiff argues that the vagueness problems which arise as a result of the Library's failure to adequately define terms such as "objectionable" and "body odor" are magnified by the *79 regulation's use of the word "etc." to complete its list of examples constituting prohibited appearance.

III. CONCLUSION

For the foregoing reasons, the Court concludes that the Library's "objectionable appearance" regulation violates the First Amendment and the Fifth Amendment's Due Process Clause, as protected by 42 U.S.C. § 1983, because the provision is neither narrowly tailored nor a reasonable time, place, and manner restriction serving a significant government interest.

From **KREIMER**:

"First Amendment encompasses positive right of public access to information and ideas, including right to some level of access to public library. U.S.C.A. Const.Amend. 1."

Public library was "limited public forum" for purposes of First Amendment;

Note: this pronouncement runs back to the USSC decision PERRY ED. ASSN. v. PERRY LOCAL EDUCATORS' ASSN., 460 U.S. 37 (1983) wherein the court said that school mailboxes (presumably in a non-public area of a school) were NOT a 'LIMITED PUBLIC FORUM', but (to this writer) gave no clue as to what in an affirmative sense might constitute a limited public forum...

Plaintiff says that courts have recognized the following:

A. A traditional public forum
B. A designated public forum
C. A non-public forum.

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Plainitiff says whether or not this court is entitled – authorized to invent-designate a new category – class of a public forum remains to be determined by the USSC.

Inference: Absent a Constitutional reason to EVICT a library patron, A library cannot restrict access to a library. This though is consistent with other findings regarding the burden of liability. The rules applied in this case were determined to be Constitutional.

Plaintiff says our case is differentiated from Kreimer as follows: The library had specific rules which the court determined to Directly apply to Kreimer's appearance 'presentation' at the library. It was said that Kreimer must have precipitated a major disruption of the library function; we read from the case the following: "(the)**library log book contained multitude of references detailing alleged disruption occurring when certain patrons chose not to use library materials while they remained in library."**

Defendant neither presents nor claims any such evidence here.

To the contrary, Plaintiff repeatedly asked Counsel for a copy of the library video recordings which 'may have' substantiated – verified the claims of either the defendant -or- of the Plaintiff, but counsel says they were not preserved. This offers us a choice between two possibilities:

Either a) Library personnel did not consider this incident of sufficient gravity to preserve the recording(s), or

b) Defendant deliberately destroyed them, knowing the video(s) were contrary to defense claims.

In any event, the reason that Kreimer was evicted was not of a specific expressive (and presumably protected) incident nature or origin; it was due to a continuing, persistent problem of comportment which apparently rose to the level of annoying several library patrons & staff, over a protracted period of time; Materially & Substantially different from our case.

Note: Plaintiff says that none of the above findings/cases has the substance or claims to overrule First Amendment rights of speech-expression.

DISCUSSION:

Restrictions cannot be invented and enforced ad hoc; they must be enumerated Except in extraordinary circumstances; Monell v. NY City Dept. of Social Services 436 U.S. 658 (NY,1978).

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Freedom of the press and Freedom of speech are different words for the same freedoms that the founding fathers wrote into our Constitution with the greatest degree of consideration-contemplation. We all learned as youthful students that the Constitution was enacted *WITHOUT the Bill of Rights*, which was proposed & espoused by James Madison and others, adapted-ratified in 1791. Thus our Bill of Rights is no accident, no 'fluke', no mere matter of 'Boiler Plate' language; it is important if not essential to our way of life, our liberties, freedoms, etc. The U.S.C. Bill of Rights was equally a product of deliberation as the main body, if not MORE.

People died defining and establishing and protecting these rights in order that we might today enjoy the very freedoms that are implicated in our case.

In numerous cases we learn that when government restricts speech, the legal burden is on the Government to show ('prove') that the restriction is Constitutional. Lewis v. Wilson Nos. 00-2149, 00-2181, 8th Circuit (MO, 2001) is Plaintiff's premier case in this regard, also see Board of Trustees of State University of New York v. Fox 492 U.S.469 (NY,1989).

INFERENCES FROM CASES ABOVE:

Standard of Scrutiny:

There are in law regarding at least two

and possibly three standards of scrutiny:

STRICT SCRUTINY: Plaintiff says that RESTRICTIONS of expressions of ideas, thoughts, opinions, of political, religious, and even social subjects by individuals are subject to 'STRICT SCRUTINY', the highest degree of protection.

Because '**a significant interference with the exercise of the fundamental right (is indicated) ... the strict scrutiny doctrine will be applied'.**

> To pass strict scrutiny, the law or policy must satisfy ~~four~~ three prongs:
>
> First, it must be justified by a **compelling governmental interest**. While the Courts have never brightly defined how to determine if an interest is compelling, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of multiple individuals, and **not violating explicit constitutional protections**.
>
> Second, the law or policy must be **narrowly tailored** to achieve that goal or interest. If the government action encompasses too much (over-inclusive) or fails to

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address essential aspects of the compelling interest (under-inclusive), then the rule is not considered narrowly tailored.

Finally, the law or policy must be the **least restrictive means** for achieving that interest. More accurately, there cannot be a less restrictive way to effectively achieve the compelling government interest, but the test will not fail just because there is another method that is equally the least restrictive. Some legal scholars consider this 'least restrictive means' requirement part of being narrowly tailored, though the Court generally evaluates it as a separate prong.

(To be considered Constitutional) ALL restrictions must be **content-neutral**; that is, they cannot favor one thought, idea, opinion, or point of view over another; they cannot be used (abused) by government to chose favorites in the marketplace of possibilities; they cannot replace, prevent, or take priority over the listeners or readers individual preferences or options.

Plaintiff says that mere convenience or encouraging a pleasant environment is not a sufficient interest; indeed, the USSC gives more than ample instruction to the contrary: from Spence v. Washington reported at 418 U.S.405 (WA, 1974):

"We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. **"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, supra, at 592.** Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. See Cohen v. California, 403 U.S. 15 (1971). Nor may appellant be punished for failing to show proper respect for our national emblem. Street v. New York, supra, at 593; Board of Education v. Barnette, supra. 6"

Plaintiff says that to be enforced by government officials is sufficient trigger for this level of scrutiny, regardless of the venue. In Marsh v. Alabama, the USSC extended this protection to expressions tendered on private property. Thus, the ownership (management) of places is not the controlling factor.

Certainly individual restrictions deserve as much (if not More) consideration than categorical restrictions; they are examined to determine if they fit into allowed categories of allowed restrictions (which have previously been sanctioned), OR, if they constitute new, additional categories.

EDENFIELD v. FANE, 507 U.S. 761 (FL, 1993) was a cases that related to advertising of CPAs to the public. The court suggested that categorical restrictions would be considered differently than specific, individual restrictions.

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INTERMEDIATE SCRUTINY:

Although sex (gender) based restrictions on conduct are coming under increased scrutiny, they do not enjoy the level of protection that matters of expression such as our case does; Freedom of speech (expression) matters are directly Constitutionally mentioned. Regarding sex-based (gender) classifications, however, the U.S. Supreme Court, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), added the requirement that, to be valid, a sex-based classification requires an "***exceedingly persuasive justification***."

Plaintiff says that our matter does not even cross this threshold.

'Rational Basis':

Economic restrictions and differentiations and other similar matters subjected to consideration can be evaluated on the basis of this level of scrutiny. The case of Fitzgerald v. Racing Assn. of Central Iowa, USSC No. 92-695 (IA, 2003) comes to mind. In this case, there was a great disparity in the taxe rate applicable to essentially the same (if not identical) activity (gambling) between locations: Riverboat locations were legislatively 'awarded' a lower tax rate as compared to land-based locations. The court said that the differentiation could be justified on the Rational Basis evaluation because the state showed a desire to continue the riverboat experience in as much as the riverboats were subject to removal to other locations (other states).

Plaintiff says that restrictions on speech – expression have Never lawfully been subject to this junior level of scrutiny.

The matter of **'protected speech' versus-compared to (the level of protection afforded) 'unprotected speech'** is an important if not overriding consideration for us.

By default, speech (content and means) is protected from restriction(s) by the First Amendment, with the equal protection language as a back-up.

Plaintiff says that the courts have held that the *means* is (almost) inconsequential when protected speech is implicated.

Examples of speech declared as being unprotected are: Pornographic ('especially' child pornography) and 'fighting words'. The well-known 'Shouting "FIRE" in a crowded theater where no danger exists IS NOT AN EXCEPTION to the 'fighting words' (clear & present Danger) designation-category; it is an example of creating a clear & present danger (caused an undue dangerous commotion)!

SECONDARY EFFECTS:

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Restrictions on protected speech have been upheld at public fora when the Secondary Effects cross a Danger threshold Frye et al v. Kansas City Police, 03-2134, 8th Circuit (MO, 2004); Bishoff v. Florida, 242 F.supp 2d 1226 11th Circuit, (FL, 2000); Renton v. Playtime Theatre, 475 U.S. 41 (WA, 1986).

Contra to Secondary cases is Cantwell v. Connecticut 310 U.S. 304 (CT, 1940). The standard I propose we glean from this case is that restrictions may be justified if they are '**likely to provoke violence AND disturbance to good order**'. Also see Ovadal v. City of Madison 416 F. 3d 531 (WI,2005).

ARBITRARY ENFORCEMENT – APPLICATION:

Restrictions on speech (laws in general?) that leave excessive discretion to officials as to enforcement are inherently unconstitutional and cannot legally be enforced.

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)

Niemotko v. Maryland, 3430 U.S. 268 (MD, 1951)

A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." [505 U.S. 123, 131] Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981).

Chicago v. Morales 527 U.S. 41 (IL,1991)

The State Supreme Court affirmed [upholding Reversal of a conviction]**, holding that the ordinance violates due process in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.**

VAGUENESS (uncertainty).

Laws in general must name specifically the conduct prohibited (or required). This is a principle so well understood it could be offensive to explain them here; Plaintiff says an extra burden of the principle-concept applies to restrictions of First Amendment freedoms, as explained above in the Strict Scrutiny language.

In our case, the conduct alleged IS NOT MENTIONED in the library Code of Conduct, which is proposed by the defense as the controlling restriction.

Vagueness Cases:

American Booksellers v. Hudnut 771 F, 2d 323 (IN,1985)

Chicago v. Morales 527 U.S. 41 (IL, 1991)

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Niemotko v. Maryland 340 U.S. 268 (MD, 1951)

Cleveland v. Anderson 13 Ohio App. 2d 83 (1968)

NO HECKLER'S VETO:

The first amendment knows No Heckler's Veto.

This means **that any hearer, intentional or unintentional, cannot overrule a speaker's right to communicate a message be it a thought, an opinion, idea, or other.**

Cases:

Hedges v. Wauconda, 9 F. 3d 1295 (IL,1992)

Lewis v. Wilson, 8th Circuit # 00-2149,00-2181 (MO,2001)

Reno v. A.C.L.U. 521 U.S. 844 (KY,1997)

Robb v. Hungerbeeler 370 F. 3d 735 (MO,2003)

Ovadal v. City of Madison, 416 F.3d 531 (WI,2005)

BURDEN OF PROOF:

Once a restriction of a speaker's Constitutional rights have been established, the burden shifts to the government; the government then is obligated to prove that a restriction (facially or as enforced) is- was Constitutional.

Lewis v. Wilson, *supra;*

United States v. Playboy Entertainment Group, 529 U.S. 803 (2000)

Mere annoyance or slight offense (such as we have here) has NEVER been sufficient.

Respectfully presented, anders Tronsen

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

Tronsen 3:08 CV 148

v. CERTIFICATE OF SERVICE

Toledo-Lucas County Public Library

Plaintiff on the 22 day of May 2008

Hereby affirms that he served copies of Request for leave to file RESTATEMENT

and

and

Upon (Defendants)

and upon the court By Personal Service

or- placing copies in the mail of the US, proper postage affixed